

FILED

JUN 19 2006

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMES EDWARD MITCHELL,

Defendant - Appellant.

No. 05-30189

D.C. No. CR-04-00011-DWM-03

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, District Judge, Presiding

Submitted June 12, 2006^{**}

Before: KLEINFELD, PAEZ, and BERZON, Circuit Judges.

James Edward Mitchell appeals from the 240-month sentence imposed following his guilty plea conviction for conspiracy to distribute methamphetamine,

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

in violation of 21 U.S.C. §§ 841(a)(1) and 846. We have jurisdiction pursuant to 28 U.S.C. § 1291.

Mitchell contends the government was required to present the allegation of his prior conviction to the grand jury because use of the conviction doubled the mandatory minimum. This contention is without merit. *See United States v. Booker*, 543 U.S. 220, 244 (2005); *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998); *United States v. Weiland*, 420 F.3d 1062, 1080 n.16 (9th Cir. 2005). Mitchell's next contention—that the government's failure to present the allegation of his prior conviction violated his right under the Grand Jury clause of the Fifth Amendment because it deprived the grand jury of its constitutional authority to determine whether to indict him—is foreclosed by *Almendarez-Torres*, 523 U.S. at 228.

AFFIRMED.